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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions in the court of appeals (R. 29–49) are reported at 363 F. 2d 488. The opinion and order of the Board of Immigration Appeals (R. 27–29) and of the special inquiry officer of the Immigration and Naturalization Service (R. 23–27) are unreported.

JURISDICTION

The judgment of the court of appeals (R. 50) was entered on July 8, 1966. The petition for a writ of certiorari was filed on August 12, 1966, and was granted on November 7, 1966 (R. 51; 385 U.S. 927). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of the Immigration and Nationality Act that makes aliens "afflicted with psychopathic personality" inadmissible to the United States (and hence deportable) embraces homosexuals.

2. Whether, so construed, the provision is void for vagueness as applied in this case because the finding that petitioner was homosexual was based, in part, upon evidence of his conduct after entry into the United States.

3. Whether the finding that petitioner was homosexual when he entered this country was adequately supported by the evidence.

4. Whether petitioner was required to be personally examined by the Public Health Service physicians who certified that he was "afflicted with psychopathic personality" within the meaning of the Immigration Act.

STATUTES INVOLVED

During the period relevant here, Section 212(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provided in pertinent part:[1]

> Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *

[1] Section 15(b) of the Act of October 3, 1965 (Public Law 89-236), 79 Stat. 919, amended paragraph (4) of the quoted provision of the 1952 Act by deleting the word "epilepsy" and substituting the words "or sexual deviation." The amendment became effective on December 1, 1965 (79 Stat. 920). See pp. 28-29, *infra*.

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;

* * * * *

Section 241(a)(1) of the Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

Sec. 241. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

STATEMENT

On August 5, 1965, following a hearing before a special inquiry officer of the Immigration and Naturalization Service (R. 16–22), petitioner was ordered deported from the United States under Sections 212(a)(4) and 241(a)(1) of the Immigration and Nationality Act of 1952 as an alien who, at the time of entry, was within a class of aliens excludable under then existing law—namely, "[a]liens afflicted with psychopathic personality" (R. 23–27). The finding that petitioner was so afflicted was based on the special inquiry officer's determination (as to which there was no substantial dispute at the hearing) that petitioner was at entry a sexual deviate of the homosexual type. An appeal by petitioner to the Board of Immigration Appeals was dismissed on January 12, 1966 (R. 27–29), and on July 8, 1966, a petition to the United States Court of Appeals for the Second Circuit for review of the Board's order was dismissed, one judge dissenting (R. 29–50).

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1. Petitioner is a 33-year-old alien, a native and citizen of Canada (R. 2, 23, 28). He is unmarried and has no children (R. 2). He was admitted to the United States for permanent residence on June 22, 1955, at the age of 21, and has been in this country continuously since that time except for three brief visits to foreign territory, the longest of which was two weeks (R. 2–3; A.R. 8).[2] He last entered the United States on or about April 25, 1959, following a one-day visit to Canada to attend the funeral of his father (R. 21–22, 28). His mother (also a citizen of Canada), stepfather, and three of his five brothers and sisters reside in the United States (R. 2, 12, 14, 31, 43). One brother and one sister live in Canada (R. 12, 14). At the time of the administrative proceedings, petitioner was employed as a utility man for a copper company in New York City (R. 9, 21).

In September 1963, as part of an application for naturalized American citizenship, petitioner submitted an affidavit to a naturalization examiner acknowledging that on October 2, 1959, he had been arrested in Brooklyn, New York, on a charge of sodomy, "anus and mouth," in violation of Section 690 of the New York Penal Law (R. 32; A.R. 11). The offense was alleged to have been committed by petitioner on a 17-year-old male youth, but the charge, according to the affidavit, had later been changed to simple assault and

[2] "A.R." references are to the numbered tabs of the administrative record before the Immigration and Naturalization Service, which was a part of the record in the court of appeals and a certified copy of which has been lodged with the Clerk of this Court.

subsequently dismissed (A.R. 11). Petitioner acknowledged in the affidavit that he committed the offense, but stated that he had since "ceased to continue homosexuality." Petitioner further stated in the affidavit that he had admitted to his Selective Service Board that he was a homosexual and that the Board had classified him 4–F (A.R. 11).[3]

On the basis of the admissions in this affidavit, petitioner was advised that the government desired additional information from him. Accordingly, on January 13, 1964, petitioner appeared before an investigator of the Immigration and Naturalization Service and gave a second sworn statement, in question-and-answer form (R. 1–10).[4] The statement may be summarized as follows:

---

[3] Petitioner attested in the affidavit the free and voluntary character of his statements and that he realized that any statement he made might be used against him as evidence in any proceeding (A.R. 11).

[4] At the opening of the interview petitioner was fully advised of his rights. He was told that any statement made would have to be voluntary, and that it might be used against him as evidence in any proceeding, civil or criminal (R. 1). Petitioner's suggestion, first made in this Court, that the investigator's advice was constitutionally deficient in failing to include a warning as to his right of counsel is misconceived, and his reliance on *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436, misplaced (Pet. Br. 5, n. 1). The administrative inquiry in which petitioner's statement was given was not a criminal proceeding. In addition, it was conducted prior to the dates of both of the above decisions (June 22, 1964, and June 13, 1966, respectively). *Johnson* v. *New Jersey*, 384 U.S. 719, of course, held that those decisions were to have prospective application only.

Petitioner's first homosexual experience occurred in Canada when he was 14 years of age, seven or eight years prior to his first entry into the United States. The incident involved attempted anal sodomy, committed on petitioner by a 40-year-old man with whom he shared a bed on a hunting trip (R. 4–5).

Petitioner's next homosexual experience occurred two years later in a public park in Halifax, Nova Scotia. He was then about 16 years old. The act involved was *fellatio,* performed upon petitioner. A second such act occurred shortly afterwards in the same park (R. 5–6). Thereafter, during the period of approximately six years immediately preceding his first entry into the United States, petitioner had homosexual relations in Halifax and Pictou County, Nova Scotia, on an average of three or four times a year. The acts all involved similar incidents of *fellatio* (R. 6). Petitioner also attested that he had had heterosexual relations, prior to his first entry into the United States, on three or four occasions (R. 6).

During the period of approximately eight and one-half years between his admission to the United States for permanent residence in 1955 and the date of his statement, petitioner continued to have homosexual relations on an average of three or four times a year, and since 1959 he had shared an apartment in Brooklyn with a man named O'Rourke with whom he had had homosexual relations two or three times a year. The last homosexual act which (according to his statement) petitioner performed with anyone occurred four months prior to his testifying, in the

apartment of, and with, a man whose name he did not know (R. 7). His relations with O'Rourke, as well as the act last mentioned, had all involved acts of *fellatio* performed upon petitioner (R. 7–8). Petitioner testified that all of his homosexual acts, both in Canada and in the United States, had been voluntary on the part both of him and of the other participant (R. 8).

Referring to the conduct for which he had been arrested in October 1959 (see pp. 4–5, *supra*), petitioner testified that it had consisted of two separate acts—one of anal sodomy committed by petitioner on his teen-age partner, the other of *fellatio,* performed upon petitioner by the same young man (R. 3–4). Asked whether he knew why his Selective Service Board had classified him 4–F in 1957, petitioner replied, "I'm homosexual." He further stated that one of the questions on the Selective Service questionnaire that he had been asked to fill out was whether he was a homosexual, and that he had answered, "Yes" (R. 8–9).

Petitioner's sworn statement was submitted to the United States Public Health Service for its opinion as to whether petitioner was excludable for any medical cause at the time of his 1955 entry. On January 17, 1964, the Public Health Service issued a certificate, signed by Paul G. Smith, M.D., Chief of Psychiatry, and Maria Sarrigiannis, M.D., Medical Director, stating that on the basis of the information contained in the statement it was the opinion of the subscribing physicians that petitioner "was afflicted with a class

A condition, namely psychopathic personality, sexual deviate" at the time of his admission (R. 11).[5]

2. On the basis of the Public Health Service's certificate and the supporting documents, deportation proceedings were instituted against petitioner on January 28, 1965. On March 8 and July 26, 1965, hearings were held before a special inquiry officer at which petitioner was represented by counsel (A.R. 4, pp. 1–10; R. 16–22). At the March 8 hearing (the transcript of which is reproduced in relevant part in the Appendix, *infra*, pp. 57–60) petitioner, through his attorney, conceded his alienage, his Canadian citizenship, and the fact that he had entered the United States on June 22, 1955; but he denied that he had been, at entry, "afflicted with a psychopathic personality, sexual deviate" (App., *infra*, p. 59; A.R. 5). Government counsel presented the certificate of the Public Health Service physicians, the affidavit that petitioner had filed in the naturalization proceedings, and his sworn question-and-answer statement. These materials were received in evidence without objection, subject to defense counsel's reserving the right to cross-examine Dr. Smith (one of the two physicians who had signed the Public Health Service certificate). Government counsel agreed to make Dr. Smith available for cross-examination and noted that he had offered petitioner's attorney the opportunity to present any additional psychiatric reports for submission to Dr. Smith as a basis of possible reconsideration by the

[5] A "Class A" condition, in Public Health Service terminology, is any condition which renders the alien mandatorily excludable under the immigration laws.

Public Health Service physicians of their certificate. Noting, further, that he had previously offered petitioner the opportunity to be personally examined by the Public Health Service, but that petitioner had declined the invitation, government counsel renewed the offer at the hearing (App., *infra*, pp. 59–60). Petitioner's counsel refused to permit petitioner to be examined by the Public Health Service, stating (*id.*, p. 60):

> We will bring in our own medical evidence. He [petitioner] will be examined by our own doctor and we will submit to you [the special inquiry officer] the findings. I will not have him submit to an examination by the Public Health Service.

At the continued hearing on July 26, 1965, petitioner's counsel introduced in evidence written reports by two private psychiatrists, Doctors Edward Falsey and Montague Ullman, dated March 2, 1964, and March 30, 1965, respectively, relating the results of their separate examinations of petitioner with reference to his psychosexual behavior and condition (R. 12–13, 14–16).* Dr. Falsey's report noted that petitioner had "explained quite frankly that he has been homosexual" (R. 12). It concluded in relevant part (R. 13):

> On psychiatric examination of Mr. Boutelier [*sic*], there was no indication of delusional

*Dr. Falsey's report was in the form of a letter to a prior attorney of petitioner's (R. 12–13, 17–18). Dr. Ullman's report was in the form of a memorandum called a "Clinical Abstract" (R. 14–16).

trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity.

Dr. Ullman's report, after referring to (among other things) petitioner's "homosexual contacts," his having "moved in with a homosexual male with whom he remained for about seven years," and his occasional heterosexual experiences (R. 15), concluded (R. 15–16):

> The patient's present difficulties obviously weigh very heavily upon him. He feels as if he has made his life in this country and is deeply disturbed at the prospect of being cut off from the life he has created for himself. He talks frankly about himself. What emerged out of the interview was not a picture of a psychopath but that of a dependent, immature young man with a conscience, an awareness of the feelings of others and a sense of personal honesty. His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that

his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.

I do not believe that Mr. Boutilier is a psychopath.

Petitioner's counsel advised the special inquiry officer that these reports were the only evidentiary materials she desired to submit (R. 18). It was stipulated between counsel that no useful purpose would be served by submitting the reports of Doctors Falsey and Ullman to the Public Health Service physicians for reconsideration of their certificate, or in having the Public Health Service doctors appear at the hearing to testify, since they would in any event testify that at the time of petitioner's arrival in the United States he "was a sexual deviate" and that, under the regulations of the Public Health Service, they were required to certify that petitioner was afflicted with psychopathic personality within the meaning of the regulations (R. 19). The petinent page of the Service's *Manual for the Medical Examination of Aliens,* requiring Service physicians to classify alien applicants for admission "who are diagnosed as sexual deviates" in the legal category "Psychopathic personality," was received in evidence (R. 19; A.R. 14).[1] Petitioner's

[1] The relevant passage (Part II, chap. 6, § A, par. 6) provided (A.R. 14):

6. *Psychopathic personality.*

a. The legal term "psychopathic personality" is equivalent to the medical designation "personality disorder," which may be broadly defined as follows: "These disorders are characterized by developmental defects or pathological trends in the personality structure, with

counsel agreed that there was "no serious contest" as to whether petitioner was a sexual deviate but only as to whether he was a "psychopathic personality" (R. 19). She stated further that "in this case" the sexual deviation involved "is homosexuality" (R. 20).

3. On August 5, 1965, the special inquiry officer, noting that "[n]o serious question" had been raised either by petitioner, his counsel, or the psychiatrists whose reports they had submitted as to petitioner's "sexual deviation" (R. 26), concluded that the charge of deportability contained in the order to show cause had been sustained, and directed petitioner's deportation (R. 23–27). The officer reviewed the legislative history of the pertinent clause of Section 212(a)(4) of the Act, and concluded that "[w]hatever the phrase 'psychopathic personality' might mean to the psychiatrists, to the Congress it was intended to include homosexuals and sex perverts" (R. 26).

Petitioner's appeal to the Board of Immigration Appeals was dismissed on January 12, 1966 (R. 27–29). The Board, like the special inquiry officer, noted that "[n]o serious question" had been raised

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minimal subjective anxiety and little or no distress. In most instances, the disorder is manifested by a lifelong pattern of action or behavior (acting out), rather than by mental or emotional symptoms." [Footnote omitted.] An example of such a certificate is Class A, Psychopathic personality, Inadequate personality.

b. Under this legal category will be classified those applicants who are diagnosed as sexual deviates. * * *

The current *Manual*, as a consequence of the Act of October 3, 1965 (see note 1, *supra*, p. 2), directs the classification of sexual deviates in the new specific category "sexual deviation" created by that Act.

as to whether petitioner was a homosexual at the time of his admission for permanent residence (R. 28).

The court of appeals, one judge dissenting, dismissed petitioner's petition for review of the deportation order (R. 29–50). The court noted in its opinion that it was "beyond contest that [petitioner] was a homosexual long before leaving Canada" (R. 41). From a study of the legislative history of the "psychopathic personality" clause of Section 212(a)(4) of the Act, the court concluded that "the clear design of Congress" was, by this clause, "to exclude homosexuals from entry" (R. 36–38, 42).

SUMMARY OF ARGUMENT

I

The legislative history of Section 212(a)(4) of the Immigration and Nationality Act of 1952 demonstrates that the provision making excludable (and hence deportable) aliens "afflicted with psychopathic personality" was intended to embrace homosexuals and other sexual deviates. The early bills provided explicitly for the exclusion of homosexuals and sex perverts. In commenting on one of these bills, the Public Health Service advised Congress that sexual deviates are ordinarily included within the Service's classification "psychopathic personality with pathologic sexuality"; that this classification would specify such types of behavior as homosexuality and sexual perversion; and that, in those instances where the disturbance in sexuality might be difficult to discover, a more obvious disturbance in personality might be apparent which would warrant a classification of

"psychopathic personality or mental defect." In accordance with the Public Health Service's recommendations, the draftsmen of the legislation omitted the specific references to homosexuals and sex perverts contained in the earlier bills and, in the final draft of the legislation, provided for the exclusion of aliens afflicted with "psychopathic personality * * * or a mental defect." The Senate Judiciary Committee explained the omission of specific reference to homosexuals and sex perverts by pointing out that the Public Health Service had "advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts." The Committee thus advised that the "change of nomenclature" was "not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates." The House Judiciary Committee likewise referred to the Public Health Service's recommendations and indicated that the bill adopted them.

The congressional objective of subsuming sexual deviates under the "psychopathic personality" provision of the 1952 Act is confirmed by the legislative history of the Act of October 3, 1965, § 15(b), 79 Stat. 919, which amended the 1952 Act to make affliction with "sexual deviation" a specific excludable condition. The committee reports of both Houses state unequivocally that the omission from the 1952 Act of a specific provision making homosexuals and sex perverts inadmissible had been in deference to repre-

sentations by the Public Health Service that the term "psychopathic personality" would encompass those classes, and that the purpose of the amendment was merely to "resolve any doubt" about the matter which might be thought to have arisen from *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449.

II

The "psychopathic personality" provision of Section 212(a)(4) is not void for vagueness as applied to homosexuals. Petitioner argues, in reliance on *Fleuti* v. *Rosenberg*, 306 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449, that the provision, if read as embracing homosexuals, is constitutionally deficient in that it failed adequately to warn him that homosexual behavior in this country, by furnishing evidence that he had a condition making him excludable when he entered, could lead to deportation. We challenge this reasoning.

A. The constitutional requirement of fair warning applies to statutes regulating or imposing sanctions upon conduct; it does not apply to an enactment that merely prescribes standards for the admission of aliens. As guides to adjudication, statutes must of course be sufficiently definite to provide judges, juries, and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly, consistently, and in accordance with the legislative purpose. Here, the legislative history of the provision in question demonstrates that Congress intended to bar homosexuals from immigration. Some statutes have

the additional function of furnishing guidance to individuals as to how they should conduct themselves in order to avoid liability. It is with respect to this function of statutes that the "void for vagueness" principle applies. This principle—that one is entitled to know before one acts what conduct the law forbids or requires—has no application to the present situation. Here, as in *Fleuti*, the statutory ground for expulsion was not the alien's conduct after entry, but his condition at the time of entry. The vagueness doctrine is not a device to enable an individual afflicted with a condition that if discovered would have barred his admission to this country so to conduct himself as to avoid making his condition known to the administrative authorities.

B. Even if petitioner had been ordered deported because of his post-entry conduct and not, as is plainly the case, because of his excludable condition at the time of entry, he could not object to any lack of clarity in the deportation statute read on its face. Congress may enact grounds of deportation retroactively, and thus render an alien deportable for past conduct which did not entail deportability when it occurred. Congress could, therefore, pass a statute retroactively making homosexual conduct by an alien within the United States a ground for his deportation. This being so, petitioner's argument—that he was entitled to advance notice that homosexual conduct in this country would result in his deportation—necessarily fails.

C. Even if the constitutional requirement of fair warning were applicable to a deportation proceeding

turning on whether the alien was properly admitted to the United States, it would doubtless be less stringent in a case such as this than in one where criminal sanctions were imposed. This Court has considered the prior construction of a State statute by the highest court of the State as fixing the statute's meaning when it was attacked as void for vagueness, and has similarly considered the legislative histories of statutes in rejecting challenges based on that ground. The same approach is appropriate here. So tested, the statute in issue does not exceed permissible bounds.

III

Assuming that a homosexual is deportable even if not proved to be a psychopath in a medical sense, petitioner's remaining contentions—that the evidence of his homosexuality was inadequate and that the law required his personal examination by the Public Health Service before it certified him as "afflicted with psychopathic personality" by reason of his homosexuality—clearly fail.

A. Petitioner's evidentiary argument is a belated effort to inject—for the first time in this Court—a factual question that was not in dispute below. Petitioner's counsel conceded petitioner's homosexuality at the deportation hearing, stating that the only question was whether his homosexuality made him a "psychopathic personality" within the meaning of the statute. The evidence of petitioner's homosexuality, which included his personal acknowledgment of a long history of homosexual behavior spanning the date of his entry, was in fact overwhelming.

B. The deportation proceedings were not defective because the Public Health Service doctors who signed the certificate attesting to petitioner's excludability at entry because of sexual deviation failed to examine him personally—relying, instead, on his sworn admissions of homosexuality. The government expressly offered petitioner, in the deportation proceedings, the opportunity to undergo the Public Health Service examination which he now insists was required. Petitioner declined the invitation. In these circumstances, he can hardly be heard to complain now that the record is deficient in this regard. In addition, while the Act gives entering aliens the right to be examined by the Public Health Service before they can be excluded on medical grounds, it accords no similar right in a deportation proceeding.

ARGUMENT

Petitioner has been ordered deported, under Section 241(a)(1) of the Immigration and Nationality Act of 1952 (p. 3, *supra*), as an alien who at the time of entry was within a class of aliens who were excludable by the law existing at that time. The "entry" involved was petitioner's original entry for permanent residence on June 22, 1955,[9] and the basis of the administrative determination that petitioner was excludable on that date was the provision of Section 212(a)(4) of the Act (pp. 2–3, *supra*) making "[a]liens afflicted with psychopathic personality" inadmissible. Since (as we show in Point III) there is no

[9] Thus, no issue involving the application of Section 241(a)(1) to a re-entry is presented. Compare *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462.

serious question whether petitioner was in fact a homosexual at entry, the principal issues here are whether the administrative officials and the court of appeals correctly construed the term "[a]liens afflicted with psychopathic personality" as applicable to homosexuals (Pet. Br. 21–28) and whether the term, so construed and applied, is constitutionally valid (Pet. Br. 12–21).

I

THE LEGISLATIVE HISTORY OF SECTION 212(a)(4) OF THE IMMIGRATION AND NATIONALITY ACT CLEARLY DEMONSTRATES THAT THE "PSYCHOPATHIC PERSONALITY" PROVISION WAS MEANT TO INCLUDE HOMOSEXUALS AND OTHER SEXUAL DEVIATES

The administrative authorities found in this case that petitioner was a sexual deviate, specifically, a homosexual. They did not find that he was psychopathic in a clinical sense. However, as the Court of Appeals for the Fifth Circuit observed in *Quiroz* v. *Neelly*, 291 F. 2d 906, 907:

> Whatever the phrase "psychopathic personality" may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts.[9]

[9] See, also, *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412–416 (C.A. 2) (concurring opinion); *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S.D.N.Y.), affirmed *per curiam sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F 2d 330 (C.A. 2), certiorari denied, 364 U.S. 824; *Matter of P———*, 7 I&N Dec. 258, 261–264 (1956). It has never been respondent's position, as petitioner mistakenly asserts (Pet. Br. 15), that the term "psychopathic personality," as used in the statute, "is merely a euphemism for 'homosexual.'" Our position, rather, is that the term *includes* homosexuals. The category clearly encompasses other medical types as well.

A. The term first appeared in the immigration laws in the 1952 Act. Under prior law, the corresponding term had been "persons of constitutional psychopathic inferiority" (Act of February 5, 1917, § 3, 39 Stat. 875, as amended, 8 U.S.C. (1946 ed.) 136(a)). Persons who were certified to be "mentally * * * defective" were also excludable under the existing law (8 U.S.C. (1946 ed.) 136(d)). In 1950, a subcommittee of the Senate Committee on the Judiciary, in a comprehensive study of the immigration laws, reported (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 345):

> The present clauses excluding mentally and physically defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States, without being unduly harsh or restrictive. The subcommittee believes, however, that the purpose of the provision against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with psychopathic personality", and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts. * * *

As a result of this study, S. 3455, 81st Cong., 2d Sess., was introduced in the Senate on April 20, 1950. Section 212(a) of the bill provided in pertinent part:

> Sec. 212. (a) The following classes of aliens shall be excluded from admission into the United States:
>
> (1) Aliens who are idiots, imbeciles, feebleminded, epileptics, or insane;
>
> * * * * * *

(3) Aliens afflicted with psychopathic personality;

* * * * *

(7) Aliens who are homosexuals or sex perverts;

(8) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a mental defect * * *.

S. 716, 82d Cong., 1st Sess., a revised version of S. 3455, introduced on January 29, 1951, was identical with the earlier bill in relevant part. However, when S. 2550, 82d Cong., 2d Sess., a further modification of the predecessor bills, was introduced on January 29, 1952, it provided, in the phraseology later enacted into law:

Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(1) Aliens who are feeble-minded;

(2) Aliens who are insane;

* * * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;

* * * * *

In explanation of the omission of the category "[a]liens who are homosexuals or sex perverts," which had appeared in the predecessor bills, the report of the Senate Judiciary Committee accompanying S. 2550 stated (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 9):

Existing law does not specifically provide for the exclusion of homosexuals and sex perverts.

> The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.* [Emphasis added.] [10]

Although S. 2550 was not enacted, a materially identical bill—H.R. 5678—was. The House Judiciary Committee report accompanying that bill (H. Rep. No. 1365, 82d Cong., 2d Sess.) referred to the advice of the Public Health Service mentioned in the passage quoted above from Senate Report 1137; reproduced in full the pertinent Public Health Service report (pp. 46–48); and indicated that the committee,

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[10] As petitioner points out (Pet. Br. 22), the report of which the quoted paragraph was a part was a majority report. Four members of the 13-member committee "respectfully disagree[d] with the majority report" and submitted "minority views," in the "hope that S. 2550 [would] not be accepted by the Senate" (S. Rep. No. 1137, 82d Cong., 2d Sess., Part 2, p. 1). Observing that the bill incorporated "hundreds of highly controversial provisions which require much more careful study and consideration by members of the committee than was possible under the circumstances" (*ibid.*), the minority proceeded, in eleven pages, to criticize various provisions of the bill (*id.*, pp. 1–11). At no point, however, did the minority take issue with the provision of the bill in issue here, or intimate any disagreement with the passage of the majority report quoted in the text.

in reporting out H.R. 5678, had (with an immaterial exception) adopted the Public Health Service's recommendations (p. 48).

The Public Health Service, in its report, was commenting on the "medical aspects" of H.R. 2379, 82d Cong., 1st Sess., a companion bill to S. 716. Like S. 716, H.R. 2379 included, as separate excludable categories, "[a]liens afflicted with psychopathic personality," "[a]liens who are homosexuals or sex perverts," and aliens not within either of those classes (or other class specified in the bill) who were certified by the examining physician as having "a mental defect." The Public Health Service recommended that "[a]liens who are homosexuals or sex perverts" be eliminated as a separate specific category, and that the language of the bill be changed to read, in pertinent part, "[a]liens afflicted with psychopathic personality * * * or a mental defect"—the phraseology ultimately enacted. H. Rep. No. 1365, 82d Cong., 2d Sess., pp. 46, 47. The Service indicated in an accompanying explanatory comment (*id.*, pp. 46–47) that while the term "psychopathic personality" was vague and indefinite, no more appropriate expression could be suggested. "The conditions classified within the group of psychopathic personalities," according to the Service,

> are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic

> personality patterns, exaggerated personality trends, or are persons ill primarily in terms of society and the prevailing culture.

"The latter or sociopathic reactions," the report continued, "are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation." *Id.*, pp. 46–47.

With respect to the provision of the bill specifying sexual perverts and homosexual persons among the aliens to be excluded, the Service commented (*id.*, p. 47):

> In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis. The detection of persons with more obvious sexual perversion is relatively simple. Considerably more difficulty may be encountered in uncovering the homosexual person.

"Ordinarily," the Service further advised (*ibid.*), "persons suffering from disturbances in sexuality are

included within the classification of 'psychopathic personality with pathologic sexuality.' *This classification will specify such types of pathologic behavior as homosexuality* or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc. In those instances where the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect." (Emphasis added.)

Finally, the Service recommended retention of the term "mental defect" in the bill for the reason that, although "broad and sweeping," it provided a safeguard against the admission of aliens with mental disturbances that did not fit into any other category.[11] There was no explicit reference to sex-related defects or disturbances in the Service's further comments under this head. *Id.*, pp. 47–48.

It is apparent from the foregoing summary of the Public Health Service's report that while the Service did not explicitly so state, it believed—and intended to convey to Congress its belief—that the clause "[a]liens afflicted with psychopathic personality * * * or a mental defect" (which the Service was recommending that Congress adopt) would effectively encompass the bill's stated objective of excluding homosexuals and sex perverts from entry, so that the specific category "[a]liens who are homosexuals or sex perverts" could

[11]The Service noted that the phrase bore "no relationship to mental deficiency which is related to the intellectual status of the individual." H. Rep. No. 1365, p. 47.

be eliminated without concern that such individuals would not be covered. That is plainly the sense in which the Senate Judiciary Committee understood the purpose of the Public Health Service's submission (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 9, quoted at pp. 21–22, *supra*), and the House Judiciary Committee, in reporting out H.R. 5678 (the bill, as noted, which became the 1952 Act), stated that the Public Health Service's recommendations had "been followed." H. Rep. No. 1365, 82d Cong., 2d Sess., p. 48.

The legislative history thus establishes, first, that Congress in the 1952 Act intended to exclude from this country all homosexual aliens (as well as sexual deviates of other types) and, second, that the language of the Act by which it intended to accomplish this result was the "psychopathic personality" provision—read independently or in conjunction with the "mental defect" provision. The Immigration Service in sexual-deviation cases has in fact uniformly proceeded under the "psychopathic personality" rubric alone,[12] without invoking the "mental defect" provision. But this is plainly proper. Although the Public Health Service's report did allude to the "mental defect" as well as to the "psychopathic personality" clause of the bill on which it was commenting, the

[12] See, *e.g.*, in addition to the instant case, *Rosenberg* v. *Fleuti*, 374 U.S. 449, 450–451; *Lavoie* v. *Immigration and Naturalization Service*, 360 F. 2d 27 (C.A. 9), pending on petition for a writ of certiorari, No. 518, this Term; *Quiroz* v. *Neelly*, 291 F.2d 906 (C.A. 5); *Matter of P———*, 7 I&N Dec. 258 (1956); *Matter of S———*, 8 I&N Dec. 400 (1959); *Matter of P———*, 9 I&N Dec. 293 (1961).

chief emphasis throughout was on the "psychopathic personality" category;[13] and the Public Health Service, in its own directives under the 1952 Act, has consistently required its physicians to classify sexually deviate aliens in the "psychopathic personality" category.[14]

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[13] Congress was definitely informed, for example, that "[o]rdinarily, persons suffering from disturbances in sexuality are included within the classification of 'psychopathic personality with pathologic sexuality'" and that "*[t]his classification will specify such types of pathologic behavior as homosexuality or sex perversion* * * *" (emphasis added). Pp. 24–25, *supra*.

[14] Public Health Service, *Manual for Medical Examination of Aliens* (1963 ed.), Part II, chap. 6, § A, par. 6 (set forth in pertinent part in note 7, *supra*, pp. 11–12); *ibid.* (1956 ed.) (identical in relevant part with 1963 edition). And see American Psychiatric Association, *Diagnostic and Statistical Manual, Mental Disorders* (1952), pp. 7, 38–39, listing "sexual deviation" as a type of "personality disorder." The Public Health Service *Manual*, which indicates that its description of the various types of mental illness follows generally the nomenclature used in the American Psychiatric Association's *Manual* (P.H.S. *Manual* (1956 and 1963 eds.), Part II, chap. 6, § A, par. 1), identifies the "legal term 'psychopathic personality'" as equivalent to the medical designation 'personality disorder'" (Part II, chap. 6, § A, par. 6, quoted *supra*, pp. 11–12, n. 7). Cf. *Fleuti* v. *Rosenberg*, 302 F. 2d 652, 657 (C.A. 9), remanded on other grounds, 374 U.S. 449.

It is clear, at all events, that an alien cannot be prejudiced by being proceeded against under the "psychopathic personality" clause alone. The "psychopathic personality" and "mental defect" clauses were enacted simultaneously and both have appeared in the Act side by side from the beginning. Since, in a deportation proceeding based on Section 212(a)(4), the specific nature of the allegedly excludable condition—*i.e.*, homosexuality or some other form of sexual deviation—must in any case be charged and proved, and since it is clear from the legislative history that the Congress meant to reach sexual deviation, it is a matter of no substantive significance under which rubric the proceeding is brought.

B. The congressional purpose to subsume sexual deviants under the "psychopathic personality" provision of the 1952 Act is confirmed by later legislative developments. Section 15(b) of the Act of October 3, 1965, 79 Stat. 919, amended Section 212(a)(4) of the 1952 Act by striking the word "epilepsy" and substituting "or sexual deviation." See p. 2, n. 1, *supra*. Section 212(a)(4) now reads:

> Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect;

The committee reports of both Houses make clear that Congress desired to "resolve any doubt" as to its intent to make sexual deviates excludable that might have been engendered by *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449. The Senate report (S. Rep. No. 748, 89th Cong., 1st Sess., pp. 18–19) states:

> In view of the representations made by the U.S. Public Health Service that the term "psychopathic personality" would encompass homosexuals and sex perverts, the Congress in enacting the Immigration and Nationality Act omitted from the law any specific provision relating to the ineligibility of such persons.
>
> * * * * *
>
> However, the U.S. Court of Appeals for the Ninth Circuit on April 17, 1962, set aside a deportation order and enjoined its enforcement

holding that section 212(a)(4) was unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term "psychopathic personality" (*Fleuti* v. *Rosenberg*, 302 F. 2d 652).

To resolve any doubt the committee has specifically included the term "sexual deviation" as a ground of exclusion in this bill. The House report (H. Rep. No. 745, 89th Cong., 1st Sess., p. 16) is to the same effect.[15]

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[15] Subsequent legislation may of course be considered to assist in the interpretation of prior legislation on the same subject. *Great Northern Railway Co.* v. *United States*, 315 U.S. 262, 277; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309; *Cope* v. *Cope*, 137 U.S. 682, 688; *United States* v. *Freeman*, 3 How. 556, 564–565. As observed in *Freeman*, *supra*, 3 How. at 564:

> [I]f it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. * * *

Nothing in *Wong Kam Wo* v. *Dulles*, 236 F. 2d 622 (C.A. 9), cited by petitioner (Br. 27, n. 23, is opposed. That case held merely that the later legislation there relied on did not, because of the peculiar circumstances involved, in fact provide a reliable guide to the meaning of the earlier enactment (236 F. 2d at 625). The court did not question—on the contrary it explicitly recognized—the *in pari materia* principle as applied to subsequent legislation. And not only the words but the legislative history of the subsequent legislation may be consulted to ascertain the intent of the earlier enactment. *Great Northern Railway Co.* v. *United States*, 315 U.S. 262, 277. Compare *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 291.

C. For the foregoing reasons, we submit that Judge Moore's dissenting opinion below is in error in stating that in the 1952 Act "Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a 'disorder of the personality' as to constitute 'psychopathic personality'" (R. 47). This suggestion is based on the portion of the Public Health Service's report to Congress in which the Service, after describing the "conditions classified within the group of psychopathic personalities" as "disorders of the personality * * * characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior," and after referring to one type of "psychopathic personality" as consisting of persons "ill primarily in terms of society and the prevailing culture," stated that "[t]he latter or sociopathic reactions * * * frequently include those groups of individuals suffering from * * * sexual deviation." Pp. 23–24, *supra*. The Service's use of the word "frequently" evoked the comment by Judge Moore that psychopathic personalities of the type referred to "evidently [do] not always" include persons with a "sexual deviation" (R. 46). This overlooks the fact that the Service, in this portion of its report, was referring only to a particular kind of psychopathic personality ("sociopathic reactions"). Later in its report, under the rubric *"Sexual perverts,"* the Service explained (see pp. 24–25, *supra*) that

> [o]rdinarily, persons suffering from disturbances in sexuality are included within the clas-

> sification of "psychopathic personality with pathologic sexuality"

and that

> [t]his classification [*i.e.*, "psychopathic personality with pathologic sexuality"] will specify such types of pathologic behavior as homosexuality or sexual perversion * * *.

Furthermore, in the final analysis the congressional purpose is revealed not by isolated language of the Public Health Service's report but by Congress' understanding of the Service's basic import. And critical to Congress, it is plain, was the Service's assurance that the legislative objective of excluding homosexuals and sexual deviates could be effectively accomplished without specifically alluding to sexual deviation. The Senate report, as we have seen, is explicit: "[t]he Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts"; the "change of nomenclature" is "not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates." P. 22, *supra*. There is no indication that the House committee did not fully acquiesce in these views.

II

THE "PYSCHOPATHIC PERSONALITY" PROVISION IS NOT VOID FOR VAGUENESS AS APPLIED TO HOMOSEXUALS

Petitioner contends that the "psychopathic personality" provision of Section 212(a)(4), if read to em-

brace homosexuals, is constitutionally deficient in that it failed adequately to warn him that homosexual behavior in this country, by furnishing evidence that he had a condition making him excludable when he entered, could lead to deportation (Br. 15–18). He cites *Fleuti* v. *Rosenberg*, 306 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449.[16]

In the *Fleuti* case, as in this case, the alien was ordered deported on the ground that he was inadmissible at entry because he was a homosexual at that time. That determination was based on evidence of a history of homosexual conduct spanning the critical date. The Ninth Circuit, believing that it was a matter of speculation whether such a determination would have been made on the basis of the alien's pre-entry conduct alone, or even whether the deportation proceeding would have been instituted solely on the basis of his pre-entry behavior, concluded that he had been prejudiced by the hearing officer's reliance, in part, on evidence which could not (in the court's view) constitutionally be considered—evidence of his post-entry homosexual activities. The evidence of Fleuti's acts in the United States, the court held, could be considered as bearing upon his condition at the time of entry only if he was properly warned, by the face of the statute, that such evidence would be relevant to

[16] See, also, *Lavoie* v. *Immigration and Naturalization Service*, 360 F. 2d 27 (C.A. 9), pending on the government's petition for a writ of certiorari, No. 513, this Term, in which the Ninth Circuit cited its *Fleuti* decision as "control[ling]." Because of the conflict between the Ninth and Second Circuits, we acquiesced in the granting of the writ of certiorari in the present case.

determining whether he had been properly admitted and thus whether he could be deported. The court ruled that the statute, as it had been administratively construed, gave no such warning.

We challenge this reasoning.[17]

One answer to petitioner's contention is that, while the administrative finding as to petitioner's excludable status in 1955 was supported in part by evidence of his conduct in this country since his entry (see R. 25–26), the result would have been the same had no such post-entry evidence been introduced. Petitioner himself admitted in the administrative proceedings that he was a homosexual and that he had regularly engaged in homosexual conduct for many years prior to his entry. Statement, *supra*, pp. 5–6, 7. This evidence alone would have required his deportation regardless of his post-entry conduct. As the special inquiry officer noted in his decision, "[n]o serious question" had been raised either by petitioner, his counsel, or the psychiatrists whose reports the defense had submitted as to the fact of petitioner's "sexual deviation" (R. 26). The Board of Immigration Appeals similarly observed that "[n]o serious question is raised as to whether [petitioner] was a homosexual at the time of his admission for permanent residence" (R. 28).

Even apart from this evidentiary consideration, we submit that petitioner's constitutional contention is untenable for three independent reasons.

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[17] This Court granted the government's petition for a writ of certiorari in the *Fleuti* case, 371 U.S. 859, but found it unnecessary, in disposing of the appeal, to reach the issue decided by the court of appeals. *Rosenberg* v. *Fleuti*, 374 U.S. 449. See p. 18, n. 8, *supra*.

A. THE CONSTITUTIONAL REQUIREMENT OF FAIR WARNING APPLIES TO STATUTES REGULATING OR IMPOSING SANCTIONS UPON CONDUCT; IT DOES NOT APPLY TO AN ENACTMENT THAT MERELY PRESCRIBES STANDARDS FOR THE ADMISSION OF ALIENS

The requirement that a statute be clear and definite in its meaning reflects two distinct considerations: that statutes guide courts, executive officials, and administrative tribunals in determining rights and duties; and that they may also serve as guides to the individuals subject to them in planning their future conduct.[18]

1. As guides to adjudication, statutes must of course be sufficiently definite to provide judges, juries, executive officials, and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly, consistently, and in accordance with the legislative purpose. *United States* v. *Petrillo,* 332 U.S. 1, 7; *Minnesota* v. *Probate Court,* 309 U.S. 270; *Mahler* v. *Eby,* 264 U.S. 32, 40–41.[19] A deportation statute, like any other, can be challenged on the ground that it provides neither the administrative authorities nor the courts with a reliable basis for determining what classes of aliens are deportable and thus leaves the selection of the aliens marked for expulsion to the caprice of the enforcing officials. But such a challenge cannot be made in reliance solely on the face of the statute, for it is the function of courts to go beyond naked statutory language and ascertain what

[18] For a discussion of these distinct considerations, see Note, *Due Process Requirements of Definiteness in Statutes,* 62 Harv. L. Rev. 77 (1948); cf. *United States* v. *Petrillo,* 332 U.S. 1, 7; *Musser* v. *Utah,* 333 U.S. 95, 97.

[19] See, further, p. 44, and n. 27, *infra.*

the legislature intended by the words it used. The courts may properly look to any available source in aid of interpretation. Thus, in construing the coverage of the federal laws relating to exclusion and deportation, the courts have frequently consulted the laws' historical backgrounds, legislative histories, and similar materials for the purpose of ascertaining—far more precisely than if the inquiry stopped with the statutory words themselves—the types or categories of persons Congress intended to encompass within designated excludable or deportable classes.[20] So long as definite standards consistent with the legislative purpose can be elicited by these methods, no problem of inadequate guidance for administrators and adjudicators arises.

Here, as we have seen, the legislative history of the provision in question demonstrates that Congress intended to bar homosexuals from immigration. The primary function of the requirement of definiteness—the facilitation of adjudication—is thus fulfilled. Petitioner is therefore mistaken—as was the court of appeals in the *Fleuti* case—in thinking it material that there are differences of opinion among psychiatrists as to the proper meaning and scope of the term "psychopathic personality" (Pet. Br. 12–14; 302 F. 2d at 657–658). Similarly, the psychiatric significance of

[20] See, *e.g.*, *Immigration and Naturalization Service* v. *Errico*, Nos. 54 and 91, this Term, decided December 12, 1966; *Costello* v. *Immigration and Naturalization Service*, 376 U.S. 120, 123–128; *Rowoldt* v. *Perfetto*, 355 U.S. 115, 120; *Galvan* v. *Press*, 347 U.S. 522, 526–528; *Knauff* v. *Shaughnessy*, 338 U.S. 537, 545–547; *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 531–533; cf. *Holy Trinity Church* v. *United States*, 143 U.S. 457, 462–465.

homosexuality (see Br. *Amicus Curiae* of Homosexual Law Reform Society of America) has no relevance. Nor is it material whether the statutory phrase be considered a medical term, as petitioner argues (Pet. Br. 13–14), or a legal one, as the Public Health Service holds (see pp. 11–12, n. 7, *supra*). It suffices—as the Fifth Circuit observed in *Quiroz* v. *Neelly, supra,* 291 F. 2d at 907—that "to the Congress it [the term] was intended to include homosexuals and sex perverts. It is that intent which controls here."

The Court need not here explore in detail the full scope or reach of the phrase "afflicted with psychopathic personality," as used in Section 212(a)(4). It may indeed be "vague and indefinite" (see H. Rep. No. 1365, 82d Cong., 2d Sess., p. 46), but for purposes of deciding this case it is enough that the legislative history establishes that Congress intended the term to embrace petitioner's condition, homosexuality. That there may be doubt as to the applicability of the term to other conditions is no reason not to apply it here; "it will be time enough," as this Court observed in a different context in *United States* v. *Wurzbach,* 280 U.S. 396, 399, "to consider [the matter] when raised by someone whom it concerns." See also, *e.g., United States* v. *Petrillo,* 332 U.S. 1, 7, 9–12; *Williams* v. *United States,* 341 U.S. 97, 101; *Jordan* v. *DeGeorge,* 341 U.S. 223, 232; *Dennis* v. *United States,* 341 U.S. 494, 516.[21]

[21] Likewise, there is no occasion in the present case to attempt a precise delineation of the class, homosexuals, included (in our view) in Section 212(a)(4). There may indeed be cases where it is difficult to determine whether—and in precisely

2. While all statutes must guide administrators and adjudicators, some have the additional function of furnishing guidance to individuals as to how they should conduct themselves in order to avoid liability. This is the familiar function, for example, of all criminal legislation. The typical criminal statute requires the performance or avoidance of specified acts, and fairness requires that the acts be described in the statute with sufficient precision to give the individuals bound by it adequate notice of what conduct they must perform or avoid. It is with respect to this function of statutes that the "void for vagueness" principle applies. This is made clear by this Court's statement of the principle in *United States* v. *Harriss*, 347 U.S. 612, 617:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Similarly, in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, the Court declared:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to in-

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what sense—an individual should be deemed homosexual within the intent of the statute. Such might be the case of an individual who had had only a few, isolated homosexual experiences and did not regard himself as homosexual. There is no ambiguity on this score here, however (see pp. 49–52, *infra*). Moreover, problems of definiteness of this nature would remain even if Congress specified "homosexuality" as a separate ground of excludability.

> form those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

And in many other decisions the Court has similarly stressed that the "constitutional requirement of definiteness" in a statute (*United States* v. *Harriss*, *supra*, 347 U.S. at 617) flows from the fact that it is the function of the statute to serve as a guide for conduct.[22]

Although the principle is primarily associated with criminal actions, it has also been invoked in civil suits. See, *e.g.*, *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239; *Miller* v. *Strahl*, 239 U.S.

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[22] See, *e.g.*, *Mishkin* v. *New York*, 383 U.S. 502, 506–507; *Bouie* v. *City of Columbia*, 378 U.S. 347, 350–355; *Wright* v. *Georgia*, 373 U.S. 284, 293; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287; *Roth* v. *United States*, 354 U.S. 476, 491–492; *Watkins* v. *United States*, 354 U.S. 178, 208; *United States* v. *Cardiff*, 344 U.S. 174, 176–177; *United States* v. *Spector*, 343 U.S. 169, 171–172; *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340; *Winters* v. *New York*, 333 U.S. 507, 515–520; *Musser* v. *Utah*, 333 U.S. 95, 96–97; *United States* v. *Petrillo*, 332 U.S. 1, 5–8; *Screws* v. *United States*, 325 U.S. 91, 101–104; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573–574; *United States* v. *Ragen*, 314 U.S. 513, 523–524; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453–458; *Herndon* v. *Lowry*, 301 U.S. 242, 261–264; *United States* v. *Wurzbach*, 280 U.S. 396, 399; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89–93; *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348.

426, 434. The principle, however, is the same in both contexts—that legislation designed to control conduct must be definite enough to give adequate guidance.[22]

The rule that one is entitled to know, before one acts, what conduct the law forbids or requires has no application to the present situation. Here, as in *Fleuti*, the statutory ground for expulsion was not conduct by the alien after entry, but his *condition at the time of entry*. The relevant provision, as the majority below observed, "was never designed to regulate *conduct;* its function was to exclude aliens possessing certain *characteristics*" (R. 41; emphasis the court's). Congress has plenary authority to make rules and regulations for the admission of aliens and to establish categories of aliens who shall be excluded or deported. *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Carlson* v. *Landon*, 342 U.S. 524; *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Fong Yue Ting* v. *United States*, 149 U.S. 698; *The Chinese Exclusion Case*, 130 U.S. 581. This authority includes the power to exclude aliens applying for admission whom Congress deems undesirable because of some mental or physi-

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[22] Thus, in *Small Co.* v. *American Sugar Refining Co.*, *supra*, the Court stated (267 U.S. at 239):

> The defendant attempts to distinguish those cases [prior decisions of the Court holding legislation invalid on grounds of vagueness] because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. * * *

cal condition, and to direct their deportation if their inadmissibility is discovered only after entry has been effected.[24] Section 212(a) (8 U.S.C. 1182(a)) is in large measure a catalog of such disqualifying conditions.[25] These provisions of the statute are in no sense guides to conduct. Therefore, the application to them of the principle requiring definiteness in behavior-governing legislation is unjustifiable.

It is the duty of the administrative authorities inquiring into an alien's admissibility to determine whether he is afflicted with any of the designated conditions; and if they have any doubt as to the meaning of any statutory term employed, there is no reason why they should not look to any available source—including the legislative history of a particular provision—to ascertain more precisely the legislative intent. If the issue arises, as here, in a deportation proceeding based on excludability at time of entry, the inquiry is the same: Is the alien within a class which Congress has declared to be inadmissible? The de-

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[24] Even those critics who have questioned the power of Congress to deport aliens for post-entry activities do not doubt that aliens inadmissible at the time of entry may properly be expelled later. See, *e.g.*, Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 Yale L.J. 1578, 1580, 69 Yale L.J. 262 (1959); cf. Boudin, *The Settler Within Our Gates*, 26 N.Y.U. L. Rev. 266, 26 N.Y.U. L. Rev. 451, 466–467, 26 N.Y.U. L. Rev. 634, 656–657 (1951).

[25] In addition to aliens afflicted with psychopathic personality, Section 212(a) requires the exclusion, for example, of "mentally retarded" persons, the "insane," those who have had "one or more attacks of insanity," those suffering from "a mental defect," "narcotic drug addicts," "chronic alcoholics," and those suffering from "any dangerous contagious disease."

portation provision of Section 241(a)(1), here geared to inadmissibility under Section 212(a)(4), requires the determination of only one question: What was the alien's condition at the time of entry? If it is found that the alien was then afflicted with psychopathic personality in the sense that Congress used the term, deportability is established.

The Ninth Circuit, in the *Fleuti* decision, sought to avoid the conclusion that Sections 212(a)(4) and 241(a)(1), since they do not purport to govern behavior, need not provide clear warning to aliens excluded or deported by pointing out that, "[w]hile the post-entry conduct [of Fleuti] was not itself the ground of deportation," such conduct "was used as evidence of a pre-entry deportable condition". It reasoned that since, "[i]nsofar as the record reveals, continuance of homosexual practices after Fleuti entered this country * * * was not compulsive, but was a matter of choice," he might not have engaged in such practices in this country had he been adequately warned by the statute that "harsh results" (deportation) might follow if he did not refrain from such conduct. 302 F. 2d at 656. The same argument is urged by the present petitioner (Pet. Br. 16).[26]

The Ninth Circuit recognized, of course, that Fleuti's post-entry conduct was not the basis for his

[26] Similarly, Judge Moore, in his dissent in the instant case, reasoned that "[h]ad the petitioner known that sexual deviation at the time of entry would be automatic grounds for exclusion, there is considerable reason to believe that he could have modified his behavior [in this country] so that he could not be considered a deviate at the time of entry" (R. 48).

deportation, but only evidence of his excludable condition at the time of entry. Thus, what the court did was to extend—in a way which we believe to be unprecedented—the doctrine of unconstitutional vagueness to protect an alien from inadvertently furnishing, by his post-admission behavior, evidence relating to his condition at time of entry. Under this theory it would be impermissible for the authorities to consider any evidence of an alien's post-entry acts, reflecting a homosexual condition at entry, which he might not have performed had he had warning of their evidential significance. Thus, such post-entry evidence as a letter, written by the alien, describing some aspect of his pre-entry homosexual conduct, or evidence of treatment for his affliction, voluntarily undertaken since entry, or statements made to employers, revealing his continuing condition, would have to be excluded for precisely the same reasons which, in the view of the court, rendered Fleuti's post-entry homosexual conduct itself inadmissible.

But, we submit, the vagueness doctrine is a canon of fairness whose purpose is to insure that no person shall incur a sanction, civil or criminal, for failure to conform his conduct to a statutory rule of action seeking to regulate his future behavior, unless the command of the statute is sufficiently clear that persons of normal intelligence will know what conduct is forbidden and what is allowed. It is not a device to enable an individual afflicted with a condition that if discovered would have barred his admission to this country so to conduct himself as to avoid making his condition known to the administrative authorities.

B. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT CONGRESS—WHICH MAY ENACT GROUNDS OF DEPORTATION RETROACTIVELY—MAKE THE GROUNDS OF DEPORTATION CLEAR ON THEIR FACE

Even if petitioner had been ordered deported because of his post-entry conduct and not, as is plainly the case, because of his excludable status at the time of entry, he could not object to the lack of clarity of the deportation statute read on its face. An alien whom the government seeks to deport is of course entitled, as a matter of procedural due process, to notice of the charges he must face at the deportation hearing. But it does not follow that, before he can become liable to deportation, Congress must first warn him of the classes which are deportable so that he may guide himself accordingly. Congress, as this Court has repeatedly held, may enact grounds of deportation retroactively, and thereby render an alien deportable for past conduct which did not entail deportability when committed. *Harisiades* v. *Shaughnessy,* 342 U.S. 580; *Galvan* v. *Press,* 347 U.S. 522; *Marcello* v. *Bonds,* 349 U.S. 302; *Lehmann* v. *Carson,* 353 U.S. 685; *Mulcahey* v. *Catalanotte,* 353 U.S. 692. See, also, *Bugajewitz* v. *Adams,* 228 U.S. 585, 591; *Ng Fung Ho* v. *White,* 259 U.S. 276, 280; *Mahler* v. *Eby,* 264 U.S. 32, 37, 39; *Eichenlaub* v. *Shaughnessy,* 338 U.S. 521, 529.

Under these decisions Congress could pass a statute retroactively making homosexual conduct by an alien within the United States a ground for his deportation. This being so, there can be no doubt that Congress could constitutionally make future homosexual conduct in this country by an alien a cause for his deportation, whether or not it expressed its intention in

a way that was not only clear to the administrative authorities and the courts, but was also plain on the statute's face to all persons concerned.

We recognize that in *Jordan* v. *De George*, 341 U.S. 223, 231–232, this Court examined, on grounds of inadequate warning, a statute making deportability turn on post-entry conduct. That decision, however, preceded the more recent decisions reaffirming the power of Congress to enact grounds of deportation retroactively. Moreover, the implications of that power with respect to the issue before the Court were not considered. The question of fair warning was not discussed in the briefs of the parties or argued before the Court (see 341 U.S. at 229), and the Court's consideration of the question appears to have been elicited by a dissent which was primarily based, not on the fact that the somewhat vague deportation provision gave inadequate warning, but on the lack of sufficiently clear standards to be applied by the administrative officials and the courts;[27] and the meaning of the statutory provision could in no way be clarified by recourse to its legislative history. The problem was thus one of the adequacy of the statute to guide its application by court and administrator. Se pp. 34–36, *supra*.

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[27] In *Mahler* v. *Eby*, 264 U.S. 32, a statute which authorized the Secretary of Labor to deport aliens (of designated classes) whom he found, after hearing, to be "undesirable residents of the United States" (Act of May 10, 1920, § 1, 41 Stat. 593) was sustained against a charge that it was unconstitutionally vague. The challenge to the statute was based, however, not on the ground that it provided no ascertainable standard of conduct for aliens to follow if they wished to avoid deportation, but on the ground that, by reason of the vagueness of the criterion of deportability, it amounted to an invalid delegation of legislative power to an executive officer. 264 U.S. at 40.

The fact that the provision involved in *De George* made deportability depend on the alien's conduct in this country also serves to distinguish that case. The statute there in issue (Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C. (1946 ed.) 155(a)—now, in substance, 8 U.S.C. 1251 (a)(4)) provided for the deportation of "any alien * * * who is hereafter sentenced more than once to such a term of imprisonment [one year or more] because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." 341 U.S. at 225. Although the provision did not, strictly speaking, require that the conduct of the alien, to be cause for his deportation, occur after the date of enactment—it was enough that the sentencing occur in the future—plainly the basic objective of the legislation was to deter the commission of serious crimes by resident aliens. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 9–10, construing the provision in issue as aimed at the "repeater" offender.[28] In other words the provision, as the majority below noted (R. 40, n. 13), was designed to "regulate post-entry conduct"—more pointedly, *criminal* conduct. There was thus some basis for

[28] See, also, S. Rep. No. 352, 64th Cong., 1st Sess., accompanying the bill (H.R. 10384) which added the provision in question to the immigration laws. The cited report (relied on in *Fong Haw Tan*, among other materials, as supporting the interpretation there adopted, see 333 U.S. at 9) noted that the provision was "intended to reach the alien who after entry shows himself to be a criminal of the confirmed type, such aliens to be deported without limitation on the length of time after entry when they commit a second serious offense" (S. Rep. No. 352, *supra*, at 15).

testing the provision against the requirements of the fair-warning doctrine that had been developed in criminal cases. The purpose of the provision involved in *Fleuti* and the instant case, on the other hand, is not to regulate future conduct but to prevent the immigration of persons suffering from specified afflictions."[20]

In sum, the decisions of this Court establish that Congress could retroactively make homosexual conduct within the United States grounds for revocation of the statutory permission to remain, and for deportation. *A fortiori* it can make such conduct grounds for deportation in a statute to be applied prospectively, whether or not the statute is clear on its face. Similarly, Congress can constitutionally make evidence of homosexual conduct in the United States relevant to a determination of an alien's admissibility at the time of entry, whether or not the alien is advised of this relevance by the face of the statute.

C. SECTION 212(a)(4), INTERPRETED IN THE LIGHT OF ITS LEGISLATIVE HISTORY, PROVIDES ADEQUATE NOTICE THAT A HOMOSEXUAL ALIEN IS NOT ADMISSIBLE TO THE UNITED STATES AND MAY BE DEPORTED IF ERRONEOUSLY ADMITTED

Even if the constitutional requirement of fair warning were applicable to a deportation proceeding turning on whether the alien was properly admitted to the

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[20] We point out, finally, that the Court in *De George sustained* the statute there challenged. 341 U.S. at 231–232. The decision is thus not a clear holding that deportation legislation, to be valid, must meet the "fair warning" standard. In the light of the actual result reached, the decision may properly be viewed as no more than a rejection of the claim of invalidity on the assumption—*arguendo*—that the "warning" rationale was relevant.

United States, doubtless it would be less stringent in a case like this than in one where criminal sanctions were imposed. Cf. *Winters* v. *New York*, 333 U.S. 507, 515; *Mahler* v. *Eby*, 264 U.S. 32, 41. The type of notice constitutionally required prior to deportation of an alien such as petitioner would have to be determined in light of the following considerations: Petitioner is being deported because he was improperly admitted rather than on the basis of his conduct in the United States; deportation is a regulatory rather than a punitive remedy; Congress may retroactively, and thus entirely without warning, make even post-entry conduct grounds for revocation of its permission for the alien to remain in the United States. In this light and in view of this Court's prior decisions in cases where the claim of unfairness resulting from absence of warning was far less attenuated, we submit that there can be no constitutional requirement that the pertinent provision be plain on its face, without recourse to its legislative history.

This Court has considered the prior construction of a State statute by the highest court of the State as fixing the statute's meaning when it was attacked as void for vagueness. See, *e.g.*, *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 285, 287; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572–574; cf. *Bouie* v. *City of Columbia*, 378 U.S. 347, 356–359.[30] Simi-

[30] Indeed, the Court has even considered the construction placed on the statute by the State's courts in the proceedings on review of the accused's conviction—*after* he has acted. In such decisions as *Beauharnais* v. *Illinois*, 343 U.S. 250, 253–254, 264, *Winters* v. *New York*, 333 U.S. 507, 512–515, *Cox* v. *New Hampshire*, 312 U.S. 569, 575–576, and *Fox* v. *Washington*, 236 U.S. 273, 277, the Court, in applying the test of definiteness to

larly, a statute's legislative history can be used to lend certainty to an otherwise insufficiently definite provision. See, *e.g.*, *United States* v. *Harriss*, 347 U.S. 612, 620–623, where the legislative history of the Federal Regulation of Lobbying Act was cited by the Court in rejecting a challenge to the constitutionality of the Act on grounds of indefiniteness; and *Screws* v. *United States*, 325 U.S. 91, 98–104, where the legislative history of former Section 20 of the Criminal Code was considered in construing the section narrowly enough to obviate a charge of unconstitutional vagueness. Cf. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 226–229; *United States* v. *Cook*, 384 U.S. 257, 260. There can therefore be no doubt that petitioner, whose right to statutory notice was, at best, far less clear, could fairly be chargeable with knowledge of what the legislative history of Section 212(a)(4) reveals with unusual clarity—that homosexuals are inadmissible to the United States.[21]

State criminal statutes, has treated the statute in each instance as though its text bore the interpretive gloss placed on it by the highest court of the State in the very proceeding in which the litigant before the bar had appealed from his conviction—in other words, after the commission of the act for which he had been brought to trial. See, *e.g.*, *Winters* v. *New York*, *supra*, 333 U.S. at 514–515: "We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation." But compare *Bouie* v. *City of Columbia*, 378 U.S. 347, 352–355; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 456. And see Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 541 (1951); Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. L. Rev. 67, 73–74 (1960).

[21] It follows that the immigration authorities were not constitutionally obliged to inform petitioner at the time of his ad-

III

THE ORDER OF DEPORTATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT INVALIDATED BY THE FAILURE OF THE PUBLIC HEALTH SERVICE PSYCHIATRISTS TO EXAMINE PETITIONER

Assuming that a homosexual is deportable even if not proved to be a psychopath in a medical sense, petitioner's remaining contentions—that the evidence of petitioner's homosexuality was inadequate and that the law required his personal examination by the Public Health Service before it certified him as "afflicted with psychopathic personality" by reason of his homosexuality—clearly fail.

A. Petitioner's evidentiary argument (Pet. Br. 32–33, 34) is a belated effort to inject—for the first time

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mission to this country that homosexuality is an excludable condition, which if discovered after entry would necessitate his future deportation. The application form (FS–256a, Revised August 1952), executed by petitioner in requesting his entry visa, contained the following printed notation: "37. I have had the following excludable clauses explained to me and state that I am not, except as hereinafter noted, a member of any one of the following classes of individuals excluded from the United States under the Immigration Act: * * *." This was followed by 24 numbered categories of persons whom the 1952 Act made excludable. The list included no reference to persons afflicted with psychopathic personality. Nor were homosexuals or sexual deviates mentioned. Following the list of excludable categories, immediately above petitioner's signature, the typewritten notation "I am not a member of any of the above mentioned classes" appeared (A.R. 6; Pet. Br. App. 37–41). The purpose of the form is not to provide information to the applicant but to enable the consular authorities to determine whether the applicant should be excluded.

in this Court—a factual question that was not in dispute below. Petitioner's counsel conceded at the deportation hearing that "no serious contest" existed as to whether petitioner was a sexual deviate, acknowledging further that the deviation "is homosexuality" and that the only question was whether petitioner's homosexuality made him a "psychopathic personality" within the meaning of the statute. On the basis of these concessions by counsel, and the evidence which had been received, the special inquiry officer noted in his decision that "[n]o serious question" had been raised in the proceedings as to the fact of petitioner's sexual deviation. The Board of Immigration Appeals likewise remarked that "[n]o serious question" existed as to the homosexuality of petitioner at the time of his admission to this country, while the court of appeals—without disagreement on this point by the dissenting judge—observed that it was "beyond contest" that petitioner had been a homosexual since before his departure from Canada.

The evidence was in fact overwhelming and undisputed. The government established at the hearing, through petitioner's own admissions under oath, that beginning in about 1949, six years prior to his entry, and continuing uninterruptedly to the date of his sworn statement (January 1964), petitioner had regularly engaged—on an average of three or four times a year—in homosexual behavior. This pattern of activity, extending over an interval of fourteen and one-half years, spanned the date of entry (June 22, 1955). It was further established that during the last five years of this period petitioner had actually been

living with one of his homosexual partners. Petitioner explicitly acknowledged that he was homosexual; and he had made the same admission to his draft board six years earlier. (Statement, *supra*, pp. 4–7.)

This evidence, coupled with the Public Health Service's certificate based upon it, compelled a finding that petitioner was homosexual when he entered.[22] It is true that petitioner, by his own account, had had occasional heterosexual experiences prior to his entry. But they were far fewer than his homosexual experiences, and hardly detract from his clearly—and concededly—dominant homosexual orientation.

Finally, the reports submitted by petitioner's psychiatrist-witnesses were in entire harmony with the hearing officer's finding, and petitioner's personal acknowledgment, that he was homosexual. The reports were in fact introduced for a quite different purpose—to show that petitioner, while homosexual, was not dangerous or psychopathic. Dr. Falsey noted in his report that petitioner had "explained

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[22] The fact that the hearing officer, in concluding that petitioner was homosexual when he entered, took into consideration his post-entry as well as his pre-entry activities (see R. 25–26) does not imply, as petitioner erroneously argues (Pet. Br. 33–35), that petitioner has been ordered deported *because of* his post-entry acts. Where the issue is whether a person was afflicted with a particular condition at a specified time, common sense and experience require that the fact-finder consider conduct after as well as prior to that time. The decision of the special inquiry officer makes clear that the basis for the deportation order was the officer's finding that petitioner was afflicted with sexual deviation "at the time of his entry" (R. 24, 27). As the court below observed, "there is not the slightest indication that the Officer failed to understand that section 212(a)(4) was directed solely at a pre-entry condition" (R. 41).

quite frankly that he has been homosexual" and did not question the correctness of this self-analysis. The doctor went on to say that his examination of petitioner had failed to reveal "delusional trend," "hallucinatory phenomena", or psychosis; but the absence of such symptoms, as we read the statute, has no relevance. Dr. Ullman, while reporting that petitioner's "sexual structure" appeared "fluid", and that he had heterosexual as well as homosexual "interests", similarly referred to his "homosexual orientation", stressing only that he did not believe petitioner was "a psychopath".[22]

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[22] In view of the absence of any serious factual question, there is no occasion for a remand in light of *Woodby* v. *Immigration and Naturalisation Service*, Nos. 40 and 80, this Term, decided December 12, 1966, where this Court held that the government in deportation proceedings must establish the facts supporting deportability by "clear, unequivocal, and convincing evidence." The Court did not indicate in its opinion whether this new rule was to have retroactive effect, and so control proceedings in which unexecuted final orders of deportation had, as here, already been entered. Cf. *Johnson* v. *New Jersey*, 384 U.S. 719, holding that the rules of *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436, have prospective application only. And see *Linkletter* v. *Walker*, 381 U.S. 618. The Immigration and Naturalization Service, however, as a matter of administrative policy, is applying the rule of the *Woodby* case retrospectively. It has directed that all cases pending in the courts involving review of deportation orders be administratively reexamined in the light of the *Woodby* decision. In cases where the *Woodby* standard is found to be applicable, and was not applied, the Service is entering into stipulations, or is obtaining court orders directing, that the cases be remanded for administrative reconsideration in the light of *Woodby*. In cases not pending in the courts, the Service has directed that before any deportation order is executed the record be examined in the light of the new *Woodby* standard. If

B. The contention (Pet. Br. 29–30) that the deportation proceedings were defective because the Public Health Service physicians who signed the certificate attesting to petitioner's excludability at entry as a sexual deviate did not personally examine him in reaching this conclusion is based on the mistaken assumption that the Immigration and Nationality Act makes the same procedures applicable both to exclusion proceedings and to deportation proceedings in which the charge of deportability is excludability at entry. The Act provides that the physical and mental examination of "arriving aliens" shall be conducted by medical officers of the Public Health Service, who shall certify, for the information of immigration officers and special inquiry officers, any physical or mental defect or disease that may be observed. Any such alien who is certified as inadmissible on any of the medical grounds specified in Section 212(a), including the "psychopathic personality" ground of paragraph (4), may appeal to a board of medical officers, to be convened by the Surgeon General, with the right to present testimony by one expert medical witness. Section 234, 8 U.S.C. 1224. The final certification goes to an examining immigration officer, who must detain the alien for further inquiry before a special inquiry officer unless it appears "clearly and beyond a doubt" that the alien is entitled to enter. The de-

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it is determined that the *Woodby* standard is applicable, and was not applied; the Service will stipulate, or will itself move, for administrative reconsideration in the light of *Woodby*. However, there would be no point in remanding a case that presented no substantial factual question—and that, we believe, is this case.

cision of the examining officer, if favorable to the alien, is subject to challenge by any other immigration officer; the effect of such a challenge is to require further inquiry before a special inquiry officer. Section 235(b), 8 U.S.C. 1225(b). The decision of the special inquiry officer must, in either case, be based solely on the medical certificate; he may not independently inquire into the facts underlying the physicians' determination. Section 236(d), 8 U.S.C. 1226(d); cf. *Johnson* v. *Shaughnessy*, 336 U.S. 806, 809.

The procedure for *deporting* an alien is radically different—and this whether the basis for the expulsion is the alien's asserted excludability at the time of his entry or subsequent conduct. The expulsion procedure (prescribed by Section 242(b) of the Act, 8 U.S.C. 1252(b)) consists essentially of an adversary proceeding in which the government, not the alien, bears the burden of proof. The special inquiry officer's decision must be based solely on the evidence introduced at the hearing and he has full authority to try *de novo* all factual questions on which the charge of deportability depends.

The deportation procedure prescribed by the Act was exactly followed in this case. Petitioner does not contend otherwise. His claim is that because an alien may not be excluded on medical grounds without a medical examination he must be given a like examination before a deportation order may be entered. The applicable statutes, as we have seen, prescribe no such requirement.

In addition, the record establishes that the government, prior to the hearing on the charge of deporta-

bility, expressly offered petitioner the opportunity to undergo the Public Health Service medical examination which he now insists was required. Petitioner declined the invitation. The government renewed its offer at the hearing, and it was again declined, petitioner's counsel stating that she "w[ould] not have him submit to an examination by the Public Health Service." Statement, *supra*, p. 9. Petitioner, in these circumstances, can hardly be heard to complain now that the record is deficient in this regard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1967.